



February 16, 2000

Ms. Ruth H. Soucy
Manager, Open Records
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2000-0549

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 132076.

The Comptroller of Public Accounts (the "comptroller") received a request for information relating to a grievance the requestor, an employee of the comptroller, had filed at the comptroller's office. You indicate that you have released to the requestor some of the information responsive to the request. You seek to withhold the remaining portions of the requested information under sections 552.103, 552.107, and 552.111 of the Government Code.

You advise that the information at issue was prepared by an attorney at the comptroller's office in connection with the requestor's complaint. You contend that this information is "attorney work product" which may be withheld under sections 552.103 or 552.111 of the Government Code. In order to be treated as attorney work product, information must have been prepared for or in anticipation of litigation and tend to reveal the thought processes of the attorney. *See* Open Records Decision No. 647 (1966), *National Tank Co. v. Brotherton*, 851 S.W.2d 193 (Tex. 1993). Attorney work product relating to anticipated or pending litigation may be withheld under section 552.103 of the Government Code; work product relating to litigation which has since concluded or is no longer anticipated may be withheld under section 552.111 of the Government Code. To show that litigation was anticipated for purposes of the "work product" doctrine, it must be shown that a reasonable person would have concluded that there was a substantial chance that litigation would ensue, or that the party resisting disclosure believed in good faith that there was a substantial chance that litigation would ensue and prepared or collected the information in question for purposes of such litigation. *National Tank Co.*, 851 S.W. 2d at 207.

Although, you advised that information at issue here was prepared or collected by the attorney because the requestor "filed a complaint and alleged his actions came within the

Texas Whistleblower Act,” we do not believe that you have established here, with respect to the information at issue, that there is or was a substantial chance that litigation would ensue or that the comptroller’s office believes or believed in good faith that there was a substantial chance that litigation would ensue. Accordingly, none of the information at issue may be withheld as work product under sections 552.103 or 552.111.¹

You also raise the attorney-client privilege for “certain individual documents and the notations on the file” included in the submitted information. The attorney client privilege is incorporated in section 552.107(1) of the Government Code, which protects information “that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.” *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney’s legal advice and confidential attorney-client communications. *Id.* Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. In our opinion, you have not established, with respect to most of the submitted information for which you claim the protection of section 552.107(1), that it constitutes attorney advice or confidential communications such as to fall within the scope of that exception. *See e.g.* Open Records Decision Nos. 589 (1991) (governmental body must identify portions of information it claims is subject to the attorney-client privilege), 469 (1987) (factual information prepared by attorney is not protected by attorney-client privilege unless it cannot be severed from attorney advice or opinion). We have, however, marked one document from which you may withhold what appear to be an attorney’s marginal notes, and another document which you may withhold if it is a draft prepared by an attorney. Otherwise, the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general

¹We note that you characterize the request as encompassing an attorney’s entire litigation file and cite *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993) for the proposition that the entire file may thus be withheld. Here, however, the requestor has asked for all information relating to her grievance. We do not believe *National Tank* applies in this instance to close the submitted information in its entirety.

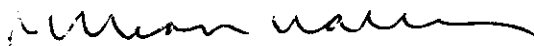
have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

WMW/ljp

Ref: ID# 132076

Encl. Submitted documents

cc: Mr. Leslie Carnes
P.O. Box 12325
Austin, Texas 78711
(w/o enclosures)